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AUTHOR Parsons, Patrick R.
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ABSTRACT

Noting that the fundamental philosophical barrier to fashioning an appropriate model of cable television rights is the equitable balancing of individual and collective First Amendment claims against the medium, this paper offers an approach for such a balancing that is based on the underlying dimension of the inherent social utility in expression. Various models of cable rights (Print, Broadcast, Public Forum, Common Carrier, and Public Utility) are tested against the resultant standard and each is found defective on either practical or philosophical grounds. It is suggested that under current constitutional interpretation only the Print model of cable rights is logically acceptable and as such nearly every form of federal, state, and local control over cable violates the First Amendment rights of the cable operator. However, since this conclusion does not satisfy the proposed aim of constitutional balancing, there should be a reinterpretation of the pivotal "Tornillo v. Miami Herald" case that would leave intact the outcome of the case as it pertains to newspapers, but would eliminate the possibility of generalizing the case to cable. This would permit the adoption of equitable balancing on the legitimate basis of market monopoly in one specifically defined medium, resulting in a model of cable rights that services the valid claims of the collective while preventing unwarranted infringement of the operators's rights. The paper's 131 footnotes are appended. (FL)

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TOWARD A THEORY OF CABLE RIGHTS

by

Patrick R. Parsons

School of Communications
Pennsylvania State University
University Park, Pa. 16802

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TOWARD A THEORY OF CABLE RIGHTS

The decisions of the D.C. Circuit in Quincy Cable TV, Inc. v. F.C.C. [1] and the Ninth Circuit in Preferred Communications, Inc. v. Los Angeles [2] illustrate a growing willingness of the judiciary to assign First Amendment protection to cable television. And the Supreme Court's ruling in Preferred has left the door open for a further strengthening of cable's shield.[3] At the same time, the precise nature and extent of cable's constitutional position remains unresolved. In Preferred, the Court strongly suggested that some balancing between the rights of the cable operators and the rights of the public must be part of the issue's resolution. Development of a full framework of cable rights will no doubt take many years. The question of the appropriate measure of First Amendment protection for the cable medium is, then, a relatively young one. Much more remains unresolved than resolved. This paper offers one perspective for viewing and analyzing the issue of cable television's constitutional status, differing from previous attempts first by laying out a clear theoretical framework for the inspection of various models of cable rights and second by offering a balanced solution to the central problem of cable's First Amendment position.

The starting point for the development of such a framework must be a broad theoretical consideration of its goals and

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ABSTRACT

This study identifies the fundamental philosophical barrier to fashioning an appropriate model of cable rights, that of the equitable balancing of individual and collective First Amendment claims against the medium. An approach for such a balancing -- based on the important underlying dimension of the inherent social utility in expression -- is advanced, and various models of cable rights are tested against the resultant standard. Each of the commonly used or proposed models -- Print, Broadcast, Public Forum, Common Carrier and Public Utility -- are examined on either practical or philosophical grounds. It is suggested that each either fails to balance individual and collective rights or lacks a legitimate rationale for the invocation of collective First Amendment interests that is required before such balancing can take place. In the end, it is suggested that under current constitutional interpretation only the Print model of cable rights is logically acceptable and as such nearly every form of federal, state and local control over cable television violates the First Amendment rights of the cable operator. Since this conclusion does not satisfy the proposed aim of constitutional balancing, however, a reinterpretation of the pivotal Tornillo v. Miami Herald case is called for. Such a reinterpretation would leave intact the outcome of the case as it pertains to newspapers, but would eliminate the possibility of generalizing the case to cable. This would permit the adoption of equitable balancing on the legitimate basis of market monopoly in one specifically defined medium. The result would be a model of cable rights that serviced the valid claims of the collective while preventing unwarranted infringement of the rights of the cable operator.

assumptions. That is the purpose of the first section of this paper. Subsequent sections analyze traditional models of cable rights and critique them on the basis of their ability to serve the conflicting First Amendment demands of various actors. Finally the paper presents a model of cable rights designed to satisfy, through compromise, the competing constitutional claims to the medium.

The Theoretical Framework

Typically, the First Amendment is thought of as serving two fundamental goals: the protection of the individual in his or her expressive activities, and the advancement of the important state interest in the free flow of information. Zechariah Chafee, for example, has pointed out the individual need "of many men to express their opinions on matters vital to them," and the social interest "in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way."[4]

In its application in the philosophy of the press, the distinction has often been described as that between the classical "libertarian" and "social responsibility" models. Schramm, Rivers and Christians explain that the former is grounded in the belief in the supremacy of the individual over the collective, while the latter considers the sanctity of the whole to be paramount.[5]

This dichotomous approach to First Amendment rights has become powerful enough, especially in recent years, to be adopted, at least from an analytical perspective, by some members of the Supreme Court. Justice William Rehnquist, for example, has applied to the two

concepts the labels "individualistic" and "utilitarian."[6] The individualistic theory, according to Rehnquist, suggests free speech as an end in itself and an end sufficiently vital to require constitutional protection. Alternatively, he sees in the utilitarian approach the goal of achieving "certain social purposes," with "the citizen's right to speak (existing) not so much because it benefits him, but because it benefits society."[7]

The Justice, while using the dualism to describe approaches to decision making, declines to locate one in a superior position. The same is true for his colleague, Justice Brennan, who creates a dichotomous system, labeling one model a "speech" model and the other a "structural" model.[8] The speech model, according to Brennan, provides protection for the individual against government interference in expressive activities.[9] The structural model considers the social value in according the institutionalized press special protection, but subsequently must balance any competing social interests;[10] it is therefore grounded more deeply in societal concerns than is the speech model.

Justice Lewis Powell, unlike his brethren, makes no pretense at neutrality but, according to one commentator, actively pursues the adoption of a social utility model that would extend special protection to the news media.[11] Lillian BeVier suggests Powell has recognized the validity of what she calls the "process-protective" rationale of the First Amendment -- a collectivistic conceptualization -- and has argued for its application in such cases as Saxbe v. Washington.[12]

In some ways paralleling Powell, the late Justice Potter Stewart

suggested a special institutional protection for the working press not available to the individual orator or pamphleteer.[13] The collective's need for surveillance of its government is the special function of the press, and government is severely limited in its authority to interfere with that function.[14] Individuals, not being representatives of the social good in the same manner, have no similar protection.

When viewed through the filters of these applications, the distinction between the two models is one of the varying protection that each might provide in different contexts. For example, when weighed against a range of countervailing social interests, one model might extend significantly more protection to speech than the competing model. Alternatively, the two models might be joined in a cooperative effort to counter some attempted governmental interference with expression. In such cases the conjunctive power of the twin rationales becomes exceedingly tenacious, for the power of both the right of the individual and the interests of society are joined against some infringement by government.

A third situation in which the dualism becomes important is much less easily resolved than the previous two, and it is the one which concerns the problem of an appropriate First Amendment model for cable. This is the situation in which the two perspectives are challenged not by exogenous social interests, but rather by each other. Competing social interests in the regulation and protection of cable television most often center around the problem of whose First Amendment rights are at stake.

The question, then, is often cast in this perceived conflict between the First Amendment rights of the collective and the First Amendment rights of the individual. The aforementioned analyses by

members of the Supreme Court are illustrative of this conceptualization. This dualism is illusory, however. A closer reading of the models of Rehnquist and Brennan, for example, reveals a fogginess of definition and imprecision of language that is characteristic of the approach. Superficial examination suggests the two take similar paths with different labels, but in fact Brennan's speech model probably comes closer to the Rehnquist utilitarian model than it does Rehnquist's individualistic model; this is because the speech and utilitarian models both find their form in the protection of individual rights based upon social consequences. Brennan's speech model seeks protection for the individual in part because of the social good that will flow from it. His structural model goes beyond even that however, suggesting special consideration for a social segment (the press) as a representative of the whole. Rehnquist's individualistic model, grounded in the sole justification of personal autonomy, finds no real counterpart in the models of Brennan or Powell.

This suggests that the list of and rationales for First Amendment protection require, at the very least, categorical expansion. Such expansion is available in the broader First Amendment theories of scholars such as Thomas Emerson and Laurence Tribe.[15]

Emerson points to at least four major objectives of his system of freedom of expression: (a) individual self-fulfillment, (b) protection for the process of advancing knowledge and discovering truth, (c) provision for participation by all citizens in society's decision making process, and (d) maintenance of the balance between consensus and healthy disagreement.[16] Tribe similarly notes the value inherent

in personal autonomy, the protection of the marketplace of ideas and the advancement of the democratic process.[17]

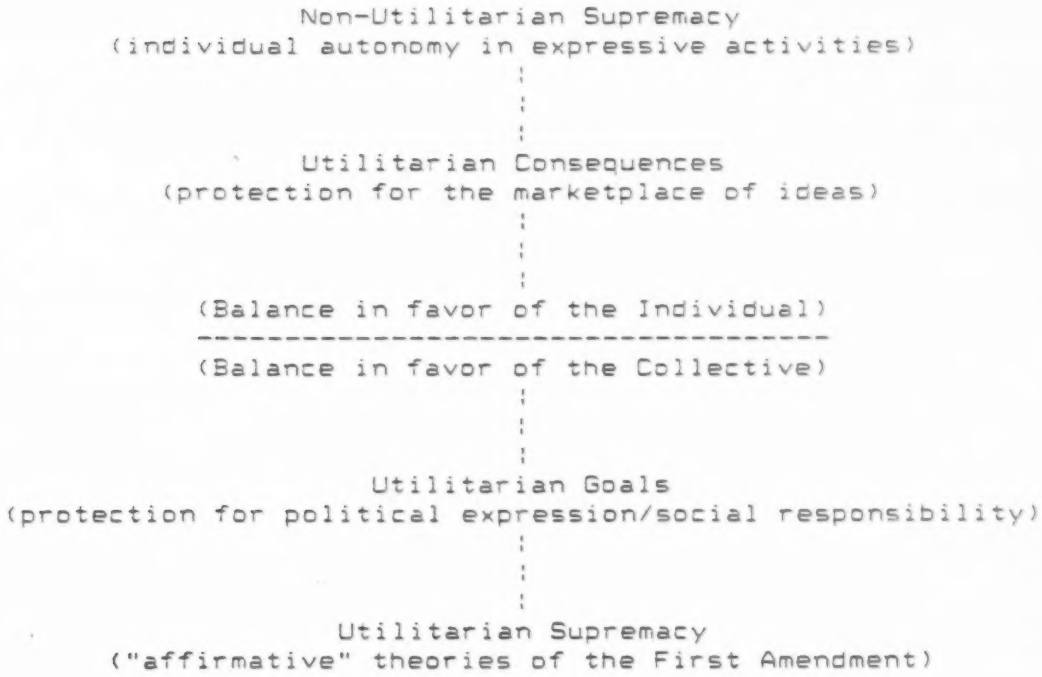
Another First Amendment scholar, Vincent Blasi, adds to this list of First Amendment functions what he calls the "checking value" of the First Amendment, that is, the so-called "watchdog function" of the press to monitor and challenge the operations of government.[18]

Such scholars contribute to the analysis by revealing the more subtle nuances of meaning nesting in the seemingly simple models of individual vs. collective, yet they retain the nominal nature of the categories, suggesting some distinct line between the various rationales for protection, and some method of placing these constitutional goals into separate and well-defined categories. It does not seem injudicious to suggest that the dividing lines between these goals are not that distinct, that the difference between protection based on the sanctity of the individual's need for expression and his need for discovering the truth through debate is not that clear cut. This then implies the need for a paradigm of First Amendment rationales based not upon nominal categories but upon a continuous scale of social value. Examined more closely, the common core attribute of any of the cited goals appears to be the amount of social utility embedded in those goals. A scale might be constructed, therefore, with First Amendment justifications ranging from those totally lacking in social utility to those totally dependent upon and subservient to social utility. Arranging the major rationales cited above on this scale would give a schematic such as that in Figure A.

The continuum finds at one extreme a rationale for First Amendment protection emanating from the claimed right of the individual to speak

his or her piece. Moving further down the social utility scale, one finds protection for speech stemming from the perceived benefits of expression for both the individual and the state in the quest for truth -- the so-called marketplace of ideas rationale. To this point, First Amendment protection takes the form of sanctions against government interference in nearly every form of speech that might broaden the scope of human thought.

Figure A
THE SOCIAL UTILITY CONTINUUM
A Scale of First Amendment Rationales


Non-Utilitarian Supremacy
(individual autonomy in expressive activities)
Utilitarian Consequences
(protection for the marketplace of ideas)
(Balance in favor of the Individual)
(Balance in favor of the Collective)
Utilitarian Goals
(protection for political expression/social responsibility)
Utilitarian Supremacy
("affirmative" theories of the First Amendment)

The Utilitarian Goals point on the continuum protects speech not on the grounds that to do so would lead to benefits for the state and the individual, but rather because the free flow of information is

essential to the proper functioning of the democracy; decisions must be made on the basis of the best and most diverse facts and opinions. Here, media outlets are encouraged to operate under a social responsibility doctrine and government can work to stimulate the process. Finally, the Utilitarian Supremacy position flows from a belief that the utilitarian nature of expression is paramount and the state may take whatever action it feels is justified in protecting and promoting the flow of information even if it results in the suppression of individual expression.

Various models of free speech can and do find themselves placed at various points along this continuum, drawing strength from greater or lesser portions of the adjacent archetypes. To understand better the roots and ramifications of these various models as they might be applied to cable television, it will be useful to examine briefly the philosophical underpinnings, strengths and weaknesses of approaches drawn from various points along the continuum.

Non-Utilitarian Supremacy

Both the Non-Utilitarian Supremacy and the Utilitarian Consequences archetypes evolve from the major elements of the classical "libertarian" theory of free speech rights.[19] The Supreme Court has pointed out the legitimate value and strength in protecting expression for no greater reason than the fulfillment of the individual.[20]

In fact, scholars have suggested that a strictly non-utilitarian reading of the First Amendment would be the most powerful in protecting freedom of expression. Thomas Scanlon dissects the field into rights based on either "institutional forms" and "moral rights," suggesting a "non-consequentialist" foundation for free speech that is

independent of any particular set of laws or institutions.[21]

A clearer and somewhat more forceful elucidation of this position comes from C. Edwin Baker who applies to his nominal categorization of the field the labels "classical model," "market failure model" and "liberty model."[22] His classic model is equivalent to the Utilitarian Consequences archetype. The market failure model gives government the right to intervene in media industry affairs to facilitate expression on the grounds of a monopolized media market, a failure of the assumptions of the libertarian model. The market failure model appears to fall somewhere between the Utilitarian Goals and Utilitarian Supremacy points on the social utility continuum.[23] The liberty model is a First Amendment rationale based totally on the right of the individual.

> Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. The liberty theory justifies protection because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others.[24]

And because the liberty model encompasses expressive activity beyond mere speech, it cures the major inadequacies of the "marketplace of ideas" model without recourse to the more drastic market failure approach, according to Baker.

Finally, Ronald Dworkin argues in favor of a "principle-based" protection for free speech in contrast with a "policy-based" rationale. The policy-based protection (a Utilitarian Consequences/Goals archetype) suffers a fatal flaw in that it allows countervailing state interest to be balanced against First Amendment interests, and balancing has never served free speech well, according

to Dworkin.[25] A First Amendment right based solely on the principle of inherent individual rights to expression cannot be so readily balanced, echoing Scanlon, and therefore is superior in the protection of expression, he argues.

Utilitarian Consequences

The other principal element of the libertarian theory, what is labelled here Utilitarian Consequences, appears to lack recent champions among the theorists, perhaps because as the fundamental justification for most of the important Supreme Court decisions in the free speech area it needs none. It is, as Justice Brennan put it, "as comfortable as a pair of old shoes."[26] Nonetheless, Everette Dennis, in his attempt to define "public interest" and reconcile it with individual interest, has provided an interesting new filter through which to view this model, and one particularly fitting to the present examination.[27] Borrowing from Alan Altshuler, he proposes that one way of looking at the social benefits derived from the protection of individual interests is actually captured in the notion of the "trickle-down" theory.[28] While Dennis discusses this concept in a slightly different context, the image of protected individual expression filtering down and manifesting itself in second and third order social effects is readily transferable to Utilitarian Consequences archetype and serves to illuminate the meaning and application of the approach.

A more eloquent statement of the position came in the Supreme Court's decision in Cohen v. California in 1971, in which the Court noted that the First and Fourteenth Amendments removed,

> government restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.[29]

Under this archetype, then, individual speech is protected in part because to do so will eventually benefit the community.

Utilitarian Goals

Unlike the Utilitarian Consequences approach which suggests that protection of the individual's right to speak will lead to pro-social consequences, the Utilitarian Goals approach starts with a concern for the collective, suggesting benefits that will eventually accrue to the individual. In short, it reverses the Utilitarian Consequences equation. This need not, however, imply a lack of concern for the rights of the individual; the importance of providing opportunity for individual expression and protecting the same from state intervention remains a significant value. It is, however, secondary to the greater good that is seen to flow from systemic protection provided the community.

Perhaps the sharpest example of First Amendment theory flowing from this perspective came from Alexander Meiklejohn in his early theory of First Amendment protection. For Meiklejohn, the First Amendment was a protection for political speech only, the aim being the smooth and proper functioning of the democratic process.[30] Government is forbidden to interfere in the expression of political ideas, but this does not mean that everyone who wishes to speak may do so under the umbrella of the First Amendment. According to Meiklejohn, "What is essential is not that everyone shall speak, but that everything

worth saying shall be said."[31] It is the idea, then, that is protected, not the individual.[32] This primary concern with the flow of ideas that will advance the social good does not, however, forsake completely the value of individual self-fulfillment through expression. According to Meiklejohn, this good is provided for, but not under the sanction of the First Amendment; it is protected by the Fifth Amendment's due process clause insuring life, liberty and property. This right of "personal speech" is, of course, of lesser value than speech that adds to the efficient functioning of society and therefore may be balanced against other social goods. But when balanced against the collective expression protected by the First Amendment, it must lose, for such expression is, under Meiklejohn's theory, protected absolutely.

While Meiklejohn has been criticized for reading too narrowly the protection extended by the First Amendment,[33] his general position illustrates an approach that would fall somewhere near the Utilitarian Goals archetype on the Social Utility Continuum, for it recognizes value in individual expression but is willing to override that value with the greater good present in expression that serves the polity.

Utilitarian Supremacy

The more extreme variant of the collectivistic philosophy, the Utilitarian Supremacy ideal type, is much less willing to recognize the value of expression based on inherent individual rights, or at least is less willing to accord them weight when balancing against the rights of the whole. This approach grants government much greater powers in manipulating the communications system in order to achieve

specified goals of information access. It is closer kin to Baker's market failure theory than the less intrusive Utilitarian Goals archetype, and it serves as the foundation for arguments that economic control of the means of communication in society justify state intervention to secure information and speech benefits for everyone.

Jerome Barron operates from this perspective in his argument in favor of state enforced access to newspapers.[34] Barron rejects the libertarian philosophies as unrealistically romantic and practically irrelevant in our modern economic system. He also implies that the weaker social responsibility variant of the utilitarian perspective is insufficient (perhaps because it is relatively unenforceable in this context) to insure the requisite diversity of opinion and ideology. The First Amendment rights of newspapers must therefore give way to the superior First Amendment rights of the collective, making state mandated access to these important vehicles of expression permissible, even vital.

In his advocacy of enforced access to the press, under an "affirmative" reading of the First Amendment, Barron points to similar requirements for the broadcast media, which serves as an example of an application of First Amendment rights that moves closer to the Utilitarian Supremacy end of the continuum. Government here, of course, exhibits significant control in all aspects of the communications industry. As the Supreme Court has pointed out:

> (T)he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount.[35]

An even stronger utilitarian position might provide for total government control over the means of communication as the best method for facilitating the goals and purposes of the First Amendment. Individual rights to freedom of expression might be discounted as relatively irrelevant under such a system. The logical extreme of such a system might be embraced in a socialist press system where the state works with the press toward understood and accepted social goals.

Toward a Full-Protection Model

Each of the points along the continuum -- Social Consequence, Non-Utilitarian Goals, etc. -- suggests a model of First Amendment rights, an archetype based upon its relative commitment to the social utility served by those rights. The central problem in any model that swings too far toward one end or another of the continuum is its failure to provide for the legitimate interests in the competing positions. Models that suggest a system of protection based chiefly on individualistic assumptions therefore neglect the important values contained in a concern for the whole, values which might not be accommodated in an elementaristic perspective. Alternatively, collectivistic theories often appear to permit the restraint of individual expressive activities in the name of the people, in spite of compelling arguments that individuals ought to be protected in their desire to express themselves even if such expression does not necessarily serve to add to discourse valued by others.

The goal, then, of any model should be to provide as much protection as possible for both the individual and the collective, to seek to accommodate all degrees of social utility. That requires

occasional balancing when goals conflict, but it is suggested here that cable may be uniquely suited to provide the greatest protection for all interests with very little reciprocal suppression of one goal for another. The problem is the fashioning of a Full Protection model of First Amendment rights applicable to the peculiar medium of cable television. In theory, it would satisfy the demands associated with nearly all points on the Social Utility Continuum, or at least be superior to any alternative models. In considering various models that could achieve this goal, two issues become important: (1) the satisfaction of the theoretical needs and, (2) the ability to accommodate practical considerations.

The theoretical aspects are chiefly the ones described above, consisting of the provision of protection for First Amendment interests associated with multiple points on the continuum. The practical aspects have not been as fully discussed but are equally important. In practice, the social utility continuum, as noted, has been taken as a dichotomous equation pitting the interests of the individual against those of the collective. The traditional, accepted model of First Amendment rights is that associated with the Social Consequences approach, essentially a form of individualistic orientation. The enforcement elements of this model are prophylactic in nature, they are the so-called "negative" powers of the First Amendment which prevent government from interfering in expressive activity.

Models drawn from the far Social Goals end of the continuum are often concerned with the government's role in advancing expression, rather than government's role in its suppression. Such models invoke the so-called "affirmative" measures advocated by Barron. This

approach is of modern and largely untested metal, however,[36] and in contests with individualistic models generally has been the loser. Such is the lesson of Tornillo.[37] In most cases, the Supreme Court has held in favor of a collectivistic model only when some additional element, some special circumstance, is present. Broadcasting is the pre-eminent example. A variety of special circumstances in broadcasting (e.g., impact, scarcity, fiduciary responsibility) have been cited in declaring in this medium the rights of society to be superior to the rights of the individual. Without such special circumstances, it seems difficult for collectivistically oriented rights to prevail over individually oriented rights in modern First Amendment law.

The practical problem for the Full Protection model for cable, then, is the assertion of some "special circumstance" that would be sufficient to support the claims of First Amendment rights flowing from a strong social utility interest. While an even balancing of individual and collective rights is sought in theory, an additional practical element, such as scarcity, seems needed to supplement the asserted social interests. Given this, the problem becomes one of analyzing the various explicitly and implicitly proposed models of cable rights and measuring them with respect to both the theoretical and practical considerations. Do they adequately satisfy the demands from all points of the continuum and do they provide a legitimate framework of special circumstances that would make the necessary balancing possible?

In summary, models grounded at different places along the Social Utility Continuum derive their raison d'etre from different mixes of

societal and individual values and produce proportionately varying protection for those values. A Full Protection model strives for the greatest amount of protection and the least amount of interference for both the rights of the individual and the rights of the collective. Various models of First Amendment rights, springing from different positions on the continuum, have been applied differentially to specific communication technologies. The task with respect to cable television is to examine each of these models and determine the extent to which they would fulfill the requirements of the Full Protection approach if they were applied to the technology of cable TV. The following discussion will use this analytic framework to critique the major proposed models of cable First Amendment rights -- the Broadcast, Print, Public Forum, Common Carrier and Public Utility models -- and suggest the parameters of a Full Protection model that answers both the theoretical and practical concerns.

The Broadcast Model

It is appropriate to begin the analysis with a look at the Broadcast model for historically it has been the model that most closely approximates the government's approach to cable regulation. Such broadcast constraints as licensing,[38] Equal Time,[39] Fairness Doctrine,[40] E.E.O.[41] and ownership controls [42] have all, at one time or another, been applied to cable. The two questions that need to be addressed, then, are the theoretical appropriateness and the practical validity of this model.

While the Broadcast model does provide some security for those values suggested by the Non-Utilitarian and Utilitarian Goals archetypes, it seems to suggest that provision for those values will be afforded only so long as they do not conflict with the countervailing values embedded in the Utilitarian Goals perspective. That is, the individual rights of the communicator to express divergent and even unpleasant ideas, even messages that from the collectivistic point of view are valueless, are honored only to the point that they do not conflict with the social goals of the communication system established by the state. Individual rights are honored, that is, only in the rhetoric of regulation; in practice there is no substantial protection for the owner and operator of the system. In C.B.S. v. F.C.C. for example, the Supreme Court extended journalistic discretion to broadcasters only to the extent that such freedom was "consistent with (their) public duties."[43]

Furthermore, the important element of content neutrality, which must be a dominant theme in any model that hopes to secure full protection for all parties, is missing. Formally, the F.C.C. is statutorily prohibited from interfering with the free speech rights of the licensed communicator.[44] But despite a plainly-worded admonition, the history of F.C.C. regulation speaks loudly to the hollowness of the language. Suppression of speech based solely on content has been exercised regularly and approved of by the courts on the basis of the medium-dependent variable First Amendment rights.[45]

With regard to the balance struck between the rights

expressed through the Non-Utilitarian end of the social utility continuum and those expressed at the Utilitarian Supremacy end, the Broadcast model appears to afford questionable protection for the rights of individual expression. On this basis alone it could be rejected as an appropriate model for cable television. But other, more practical, problems exist as well. These have to do with the necessary lever by which the collectivistic values are asserted in the first instance over the elementaristic values. Fundamental to the application of "affirmative" rights of the public is, as already noted, some showing of special circumstances that warrants overturning the traditional supremacy of the Non-Utilitarian and Utilitarian Consequences model of individual protection. In broadcasting these special circumstances have included the scarcity of the airwaves, public ownership of the spectrum and the impact or ubiquity of the medium. In cable, historic application of the Broadcast model has been premised on the doctrine of some special relationship between cable and over-the-air television, the so-called ancillarity doctrine.[46]

The argument of the use of scarcity to breach individual rights has been asserted (and countered) in two dimensions, the claim of a limited number of channels of communication and a naturally limited number of "controlling voices." The first claim is specious on its face. The promise of cable as a medium of abundance is its oldest and most advertised claim. While it is true that no outer limits have been set on the meaning of natural scarcity (perhaps even 30 channels in a town is insufficient to meet expressive needs) it is also true that all elements in

nature are finite, and the natural limit on the number of acres planted in lumber does not serve to justify government control of the print medium. The courts and the regulators have now long noted that scarcity of channels is insufficient justification for the regulation of cable,[47] and this appears to be growing less reasonable as a rationale with every advance in the technology.

The limit to the number of voices refers to the argument that cable systems should be the unit of measure rather than cable channels, for unlike channels, the number of systems in a given area is naturally restricted. This argument takes two forms. The first suggests cable to be an economic monopoly which naturally restricts through market forces the number of systems in a given area to one. The second suggests a physical barrier to multiple cable systems analogous to spectrum scarcity in broadcasting.

As to the first, there is little economic dispute. Even among critics who suggest that other technologies provide economic competition,[48] there is a grudging admission that a declining average cost curve is characteristic of the medium and so pressure toward monopoly status is ever present.[49] The courts, regulators and the industry itself all agree that cable systems do, in fact, tend to be natural economic monopolies. The question is not whether that tendency exists, but whether it is sufficient cause to overcome the assumed dominance of the First Amendment rights of the individual. Here the pivotal case is Miami Herald v. Tornillo.[50] In considering the question of economic scarcity in the newspaper industry, the Supreme Court in

this case rejected the argument that monopoly was sufficient grounds upon which to premise a state-enforced access to the medium in question. The unanimous decision of the Court in Tornillo has been repeatedly cited by lower courts and others as evidence against the realistic possibility of a monopoly-driven access argument for cable.[51] The validity of this position, that monopoly can not act as a special circumstance in cable, will be questioned shortly, but for the moment accepted as inflexible precedent.

The notion that some physical barrier exists to the number of wires that can be strung throughout a city is at best problematic. When too many broadcast signals are forced into a given range in the radio spectrum is interference. There is no analogy to this in cablecasting; wires strung too closely together or in large groups may become unsightly, but they will not be functionally altered. Several courts have noted this [52] and many cities and states acknowledge it by providing for non-exclusive franchises.[53] Co-extensive, competing cable systems are, furthermore, not unknown.[54] The notion of physical scarcity in either ownership or channels appears now to be an abandoned justification for government regulation of cable.

Closely akin to the scarcity argument in broadcast regulation is the proposal that the airwaves are a public resource and licensees are keepers of the public trust. It suggests a fiduciary role for those granted limited permission for use of the public domain. The question that arises in extending this argument to cablecasting is that of identifying the pertinent public or natural resource. Cable communication

utilizes copper wires or fiber optics that are run underground or along poles to subscriber homes. It is unlikely that the actual wires could be considered within the public domain. But the use of public streets, alleyways and thoroughfares has been advanced as a justification for state control.[55] Where the stringing and maintenance of wires presents a public disturbance there is no question but that the appropriate local agency has the right to regulate to keep such disturbance to a minimum. As the 10th Circuit pointed out in C.C.C. v. Boulder:

> Some form of permission from the government must, by necessity, precede such disruptive use of the public domain. We do not see how it could be otherwise. A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur. Thus, government and cable operators are tied in a way that government and newspapers are not.[56]

But does this tie cable to government so closely that the state may impose restrictions beyond those necessary to assure the peace and safety of its citizens using streets and thoroughfares during construction? Does the First Amendment doctrine permitting the equitable application of business laws to newspapers permit the control of the content of those papers or give government authority to license magazines? In the realm of the First Amendment it has long been decided that a government restriction may be no greater than is necessary to meet the immediate and well-defined state objective.[57] As the Supreme Court noted in Cantwell v. Connecticut in 1940:

> When clear and present danger of riot, disorder, interference with traffic upon the streets, or other immediate threat to public safety, peace or order appears,

> the power of the state to prevent or punish is obvious. Equally obvious is that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.[58]

To extend the broad control associated with the Broadcast model to cable television on the grounds that operators must pass over or under public thoroughfares seems to stretch the rationale beyond its logical capacity.[59] Fairness, access and indecency controls predicated upon street usage appear infirm at best.

Prior to the Cable Communications Act of 1984, the F.C.C. urged and the courts accepted the notion of statutory jurisdiction over cable through its relationship with broadcast television. Most of the analysis of this doctrine focused on the question of ancillarity, and the degree to which cable in all its specific functions was ancillary to over-the-air TV. Thus, the Supreme Court rejected the Commission's attempt in Midwest Video II to require cablecasters to provide access, deciding in part on the grounds that such a rule was not reasonably ancillary to its authority over broadcasting.[60] But analysis that focused on the ancillarity doctrine in consideration of the constitutionality of F.C.C. authority over cable was misplaced. The special circumstances that appeared to provide the window for application of affirmative rights here was not cable's ancillary relation to broadcasting, it was Section 153(a) of the Communications Act, which gives F.C.C. authority over "all interstate and foreign communications by wire or radio . . . including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."[61]

Ancillarity only established the outer limits of Commission authority over cable, it did not provide for that authority in the first instance. That accrued through application of Section 153. The question then is one of the validity of that interpretation, from the Supreme Court's decision in U.S. v. Southwestern, in light of the First Amendment. Is the Interstate Communication clause of sufficient weight to overpower the non-utilitarian rights of the cablecaster?

Like the newer Cable Communications Policy Act of 1984, reliance on the Communications Act itself to counter constitutional concerns begs the question. There is no doubt that Congress, and perhaps the F.C.C., have the power to control those portions of the business of cable communication that deal directly with its activity as a business enterprise. Such authority does not, however, give government the right to use such regulations to fashion content agreeable to the aims of the state. The Cable Act and Section 153, when invoked as a justification for content control, must themselves be questioned on First Amendment grounds. Without additional support, such as a scarcity argument, they alone can not be used to supplant First Amendment guarantees. And if application of Section 153 cannot meet a constitutional challenge, then validity of the ancillarity doctrine becomes a moot question. In short, the existence of a statute itself is no a special circumstance. The question, in the first instance, is whether Congress has the right to impose the various restrictions embedded in the Act given the arguable First Amendment rights of the medium.

In summary, the Broadcast model lacks both the theoretical and practical prerequisites. It fails to provide sufficient protection to the individual from potential state interference in free speech by casting the balance too far in favor of the utilitarian supremacy end of the continuum. Practically, the model fails to provide the special circumstances needed to justify the application of the less well established rights of the collective. The model offers no rationale for the intervention of the state into the First Amendment rights of the cable operator and therefore fails to provide for the valid First Amendment interests of the utilitarian goals approach.

The Print Model

In part because of the historic reluctance of the Supreme Court to grapple directly with the question, the lower courts have filled the vacuum of decision-making and have begun to render decisions equating cable television rights with those of the print media. With increasing regularity, the courts have sought and failed to find sufficient justification to overcome the assumptions of an individualistically situated model of cable rights.

Beginning with Home Box Office v F.C.C. in 1977, many lower courts have rejected the Broadcast-like regulation imposed by the F.C.C. In H.B.O., the D.C. Circuit specifically attacked previous rulings that extended broadcast rationales to cable.[62] A few years later, the Eighth Circuit, in F.C.C. v. Midwest Video, also drew the strong parallel between cable and print rights.[63] Since then, content controls aimed at restricting "obscene and

indecent" programming on cable have been rejected using the standards for print rather than broadcast.[64] And the Ninth Circuit has ruled that even some forms of franchising may present unconstitutional prior restraints on the cable operator's freedom of expression.[65]

There have been some decisions upholding government controls on cable,[66] but they appear to be the exception more than the rule.

The movement, if it can be called that, toward expanded rights for cable may be at least partially political and tied to the general trend toward deregulation. The cable industry in the late 1970s and early 1980s began lobbying strenuously for the approval of new regulatory and constitutional laws for cable.[67] Declared Nation Cable Television Association:

> Cable operators are entitled to the freedom of speech granted newspapers, without conditions and without requirements of access or balance. To hold otherwise, to deny First Amendment rights to cable operators, is to undermine not merely cable's constitutional rights, but society's interest in diverse expressions of points of view, uninhibited by fear of government interference or control.[68]

This strongly stated position seems to be growing in popularity. But is it the best available model for cable rights? The major strength of the Print model, in its application to cable, is the inherent lack of need for any special circumstances with which to justify an affirmative government role. That is not a question here. There is no presumption of the need to serve the collective interest; the philosophical origins and the goals of the model dictate only that the state keep out of the free speech affairs of the individual. When this course is followed,

the collective will be served in its own good way. The consequence for the Print Model, as considered here, is the total lack of any practical problem in its invocation and use in cable regulation. That is, there are no First Amendment barriers to the application of the model to cable. This, of course, has been the thrust of the above noted court decisions [69] and could eventually become the First Amendment standard, were the Supreme Court to follow the same line as lower courts. All of which does not go to suggest that such a turn of events would best serve the interests of a full protection theory of First Amendment rights.

While the lack of a need for special circumstances appears to be the principal practical strength of the Print model, it is, at the same time, its fundamental philosophical weakness. The model rests on a commitment to the rights of the individual, and to some extent the belief that the results of such protection will benefit the whole. This second point is important for it suggests at least one aspect of the Print model draws strength from the middle-range of the social utility continuum that holds service to the collective to be an important social value. And scholars and philosophers who hold to a libertarian line often fall back on the alleged efficacy of this "trickle down" theory of First Amendment rights. The print model does not argue against the value or necessity of collectivistic free speech arguments, it only differs in the method of such service.

The position of this paper, however, is that the Print model is, in application to cable, untenable because the assumptions of the "trickle down" theory are not met. With respect to at least

cable, Baker's "failed market" theory is the most relevant framework for analysis. In the newspaper industry, the assumptions of diversity within the marketplace, and ease of entry into the arena of expression, have, according to critics such as Barron, been lost over time through the economic realities of a capital economy.[70] But to the extent that the assumptions of the Print Model have eroded in the newspaper industry, they probably never even existed in the cable industry. As has been pointed out, the business of cable television appears to be a natural economic monopoly. A single owner-operator, a lone communications company, will most likely control a given geographic area to the exclusion of all potential competitors. And although the courts have ruled that the presence of economic monopoly alone is insufficient to override the constitutional protection provided the communicator under the print model, the absolute control a communicator has over the free flow of ideas through that particular medium within that particular area is no less real; and the danger to the collective equally real. Social, cultural, political ideas and opinions at odds with the owner of a monopolistic communications system face the possibility of never reaching the audience for which they were intended. The collective is denied the interchange of thought that powers the polity. The First Amendment rights espoused by Meiklejohn are frustrated and even the Utilitarian Consequences approach to First Amendment rights endangered.

With respect to the broad aims outlined earlier, the Print model, when applied to cable television regulation, appears in the end to fall short. While the model may, in fact, work

effectively for some media, the "peculiar characteristics" of cable are such that the major assumptions of the model cannot be met. The essential mechanism of an open economic marketplace, at least in this medium, appears not to be a realizable achievement. The Print model, therefore, while eminently practical, must be rejected on philosophical grounds. It simply fails to meet the criteria for a Full Protection model of First Amendment rights.

The Public Forum Model

The Broadcast and Print models of cable regulation represent the traditional, mainstream approaches to the discussion of cable rights. The three non-traditional models that appear in the literature, and represent paths to the balancing of individual and collective First Amendment claims, include the Public Forum, Common Carrier and Public Utility models. The Public Forum model will be considered first.

The question of public access to government licensed communications systems gives almost immediate rise to the thought of public forum theory.[71] As traditionally defined, public forum theory provides non-discriminatory public access for First Amendment purposes to public places traditionally situated for such activity.[72] Despite the fact that various restrictions may be placed on the use of public thoroughfares for such activity,[73] the public forum doctrine has been extended to provide coverage for expressive activity in airports,[74] bus terminals,[75] school grounds and auditoriums,[76] public hospitals,[77] the U.S. Capitol grounds,[78] and the Supreme Court grounds.[79]

Unlike the Broadcast Model, the public forum approach provides little grounds for general operating, ownership or content control. The only permissible mandate provided by the Public Forum model is the proffering by the cable company of sufficient access time and space to satisfy the demand of the community and individuals within the community for necessary expressive activity. It is, in fact, a relatively straightforward access requirement. The important difference between this access requirement and those forged by federal, state and local authorities is that this requirement is not statutory, it springs from the Constitution, or rather a specific interpretation of the First Amendment rights of the community with respect to the asserted public forum of cable TV.

In general, the invocation of a Public Forum model in cable television would result in a requirement that access be granted to individuals seeking a local outlet for expression. But the state would be forbidden to interfere with the cable operator beyond assuring such access. Special structural and behavioral controls would not be permitted as the result of public forum application and the First Amendment rights of the cable operator could be protected.

As a result, the Public Forum model seems to serve admirably the balancing of interests sought in a Full Protection model. It provides for the protection of the rights of the community to receive information and ideas which a cable operator on his or her own might be loath to disseminate, and at the same time, it prevents government from either censoring the cablecaster or

using the model to enact structural or behavioral controls that might chill the cablecaster's speech.

There remains, however, the question of the requisite elements necessary for the establishment of a public forum. In the first instance, it is necessary that the area in question be controlled directly by the government or to so closely resemble such control as to make the distinction irrelevant.[80] Secondly, the assumed public forum must have some historically based nexus with the exercise of free speech. Street and parks, for example, are held in Hague v. C.I.O and subsequent cases to be "historically associated with the exercise of First Amendment rights."[81] Finally, the courts have suggested that the activity in question should be compatible with the normal usage of the asserted forum. Picketers, therefore, have been subjected to time, place and manner restraints on the basis of the incompatibility of their activities with the functioning of a nearby school.[82]

The question of state action, then, represents the first concern in attempting to apply a Public Forum model to cable. State action exists, by definition, where the government owns and directly controls the claimed forum. Most cable systems are not, however, owned by the state. They do require an operating license, but any attempt to claim access rights on the basis of municipal or federal licensing is, in a public forum context, circular reasoning, as it is the constitutional validity of the licensing itself that is in question.

Nonetheless, cable systems are certainly involved

historically in the dissemination of information, so one argued route for the application of state action might be a compatibility analysis.[83] For example, in Southeastern Promotions, the Supreme Court held out a thread of hope for the extension of public forum doctrine to cable by suggesting the impropriety of government censorship of a forum -- a city auditorium -- which traditionally had been dedicated to expressive activity.[84] Drawing from this, the function and use of cable systems may be so intertwined with public communication as to make mandated public access compatible with that function.

Unfortunately, the courts have severely limited this application in general [85] and have declined to extend it at all communication forums analogous to cable. In situations involving student newspapers [86] and public [87] and private [88] broadcasting stations, the courts have declined to find a public forum, suggesting that these media had inherent in their management an insular layer of control between government and the public. Government did not have direct control over the medium due to this insulation and so state action did not apply. In fact, the media had a strong dose of their own constitutional rights, according to the courts.

While these cases are not completely determinative for cable, neither are they terribly encouraging. It appears, therefore, that while a Public Forum model of cable rights might serve well the interests of the public and the cable operator, striking a balance between Social and Utilitarian Supremacy, the requisite elements of public forum doctrine do not seem sufficiently in evidence in cable to provide for its application.

Substantial problems in the area of state action and compatibility have been created by court decisions and the situation seems unlikely to change in the near future.

The Public Utility and Common Carrier Models

The Cable Communications Policy Act of 1984 specifically forbids the regulation of cable television as a public utility.[89] Still, the public utility approach is perhaps the oldest recorded method of governmental oversight and historically it is the model many access advocates have endorsed as a means of satisfying collectivist First Amendment demands.[90] In addition, there may be some question as to the constitutionality of the Cable Act itself.

In practice, imposition of public utility status could take one of two forms, a pure public utility model or a common carrier model. Common carriers, a special case of public utility regulation and the case most closely associated with communications, shall be considered first.[91]

Advocacy of a common carrier position for cable, either totally or in part, has been a recurrent theme in the debate over CATV control,[92] persisting into modern legislative proposals.[93] It has been considered one approach to the equitable allocation of communication services to both individuals and to the community. In practice, a common carrier approach would strip the cable operator of nearly all First Amendment rights. The operator would have little or no control over the content of the system, being required to simply provide space on the cable system for independent programmers. A wide variety of controls on ownership

and industry structure and business practices also would be permissible.

Given such circumstances, it is plain the model falls short of providing the constitutional balance sought. Just as the Print model provides no latitude for the servicing of community goals (beyond those that accrue naturally), the Common Carrier model provides no latitude for the servicing of potential First Amendment interests of the cable operator. The model represents the far end of the social supremacy category, and while it might effectively serve the needs of the society for an open flow of dialogue, it offends the interests of the individual owner-operator and must be rejected.

A partial common carrier, one that calls for the provision of a limited, specified number of access channels, does not suffer from the same weakness, but neither is it a true common carrier. It more justifiably might be considered a different form of public utility, or at least could be accommodated within the Public Utility model.

The states historically have regulated cable television as a public utility without designating it as a common carrier. Some states have declared, through administrative or legislative action, that cable television is a public utility subject to the attendant substantive and procedural public utility guidelines.[94] Other states have simply invested within their public utilities commissions or departments the power to oversee the operation of cable without specifically declaring cable a public utility.[95] In those states that have not yet established a general state-

wide regulatory policy toward cable, proposals for such regulation have historically taken the form of a Public Utility model.[96]

Long before the 1984 Cable Act, the federal government had considered the relationship between CATV and public utilities, generally in the course of debate over the appropriate roles of federal and state oversight of the medium. In 1966, for example, the F.C.C. argued that, for many important purposes, cable television could and should be considered a public utility subject to state regulation,[97] a position vigorously attacked by the cable industry.[98]

In practice, under a Public Utility model, cable operators would enjoy greater First Amendment latitude than under the Common Carrier model, but the balance of control would still favor the state. Industry structure could be closely monitored and manipulated. Franchise terms specifying the length of the contract, its geographic area, and qualifying characteristics of potential owners are illustrative. Access requirements are also typical of this model. In addition, service requirements such as the provision by the company of equipment and studios for public access programming, and perhaps even ascertainment by the operator of local community needs, could be mandated.

Less clear is the balance that would have to be struck between operator and community in the area of content. A straight-forward approach to public utility type regulation might suggest little operator recourse in the event of state or local demands or restraints on programming practices. On the other hand, in 1980 in Consolidated Edison Co. of New York v. Public

Service Commission of New York, the Supreme Court said for the first time that public utilities do have some degree of First Amendment protection for the expression of their controversial views.[99] How far that protection might extend is left ambiguous by the decision, however, for the facts of Consolidated may not be analogous to the expression-devoted medium of cable.[100]

The Public Utility model of cable First Amendment rights would fall then on the social utility continuum somewhere between the Social Goal and Social Supremacy archetypes. It casts information and communication as important social needs, services provided for the general welfare. There are concessions to the First Amendment rights of the system operator, the individual, making the model less severe with respect to those rights than the common carrier approach. Unlike that model, a public utilities scenario seeks to assure that access to the communication system is provided for all members of the community while at the same time attempting to protect the right of the operator to use the system for communicative purposes as well. There is, then, some attempt at balance here.

Nontheless, there is within the model multiple avenues for suppression of individual (cablecaster) speech even though they may be innocent in intent. Ownership restrictions, access regulations and service requirements that indirectly mandate or prohibit certain programming practices (e.g., obligatory community access centers) may all contribute to restrict the range of editorial discretion permitted the system operator. The model appears, therefore, to balance too heavily on the side of

the collective. At the very least, its ability to fully service the First Amendment rights of the cablecaster are suspect. On philosophical grounds alone, then, it is a weak candidate for a Full Protection model.

There are two problems that must be addressed in considering the legitimate practical application of the Public Utility model to cable: first, does the definition fit, is cable a public utility within the legal and historic sense of the word? If it is not, then there are no grounds at the outset for a consideration of special circumstances that would overwhelm the assumed First Amendment preference for individual protection. Second, if it can be successfully argued that it does meet the proper criteria, is standing as a public utility sufficient cause to overcome the First Amendment interests of the individual, that is, is it a sufficient special circumstance to trigger the search for a balancing of individual and collective rights?

The principal characteristics of a public utility are generally conceded to be the provision of an important public commodity or service and a position as a natural economic monopoly.[101] At the same time, a precise definition of public utility and a general agreement on specific applications of the term has historically escaped both regulators and judges.[102] Whether or not a particular enterprise is impressed with an important public interest is often dependent upon the facts of the particular case as perceived by the state.[103] And despite the holding by many states that cable is a public utility, just as many have rejected that notion.[104]

While there is little disagreement about cable's status as a

natural economic monopoly, there is substantial dispute over its position as a necessary public service. For example, in House Interstate Commerce Committee hearings in 1966, F.C.C. Chairman Henry argued that cable did provide a necessary public service, citing as support the amount of mail received by the Commission whenever "the public thought that its television service might be lost."[105] Although the reasoning has been somewhat more substantive, many state courts have agreed.[106] The New York Supreme Court, for example, has twice ruled that cable is adequately invested with the public interest to support a finding of public utility status.[107] At least one federal court has drawn a parallel between cable television service and a parcel delivery service [108] and found "no reason to conclude cable (was) not monopolistic in character and not affected with the public interest."[109]

Few courts, however, have really specified the nature of the essential public service provided by cable, save for commenting on the general need for telecommunication services. In White v. City of Ann Arbor, the Michigan Supreme Court noted, for example:

> While cable television may not cater to the physical needs of man as do utilities that provide heat, light and power, it provides an equally important service in terms of the rational, psychological and aesthetic growth process of man. Further, as many commentators adroitly point out, cable television is in its essence a de facto monopoly.[110]

The question remains, however, whether such needs are of the type envisioned in the construction of most of the accepted definitions of a public utility. It has been the position of the N.C.T.A. that cable is, in fact, not an essential service. The

public good accruing from cable television can be equally derived from other entertainment and information sources, claim defenders of this viewpoint. Cable, as a result, is at best a luxury service.[111] This appears to be the position taken by a U.S. district court in 1968 in its observation that the public need for cable television was about as severe as the public need for "hand-carved ivory back scratchers."[112] The Washington state Supreme Court ruled in a similar vein in 1980, characterizing cable as essentially "a luxury service," and "a television improvement."[113]

Related, and equally unresolved, is the question of the legitimacy of regulation as a public utility in conjunction with cable's use of public thoroughfares. Scholars such as de Sola Pool support the legitimacy of such a rationale,[114] and some courts have agreed.[115] Others, however, have ruled cable to be a private business and numerous local franchise requirements based on the police power over use of public thoroughfares to be invalid.[116]

It seems to come down to a rather subjective evaluation as to the value of cable television. It is very shaky ground upon which to base constitutional law. It is perhaps best to concede then, at least arguendo, that cable could be declared a public utility, which raises the next important question of whether that designation is a sufficient special circumstance to overcome the First Amendment rights of the operator. In fact, the three elements that coalesce to form the grounds for public utility status already have been examined and found wanting.

The issue of cable's position as an economic monopoly has been considered at length and, due to the holding in Tornillo rejected as a basis for state control. The proposition that the use of public thoroughfares is adequate justification for an affirmative reading of the First Amendment has also been considered and rejected. An argument that public interest inherent in cable television service is sufficient justification for government control is, in its broadest philosophical sense, simply a restatement of the notion that the rights of the collective should carry greater weight than the rights of the individual in First Amendment law. This, then, becomes circular logic, rather than an exposition of special circumstances that would justify a reversal of established doctrine.

Philosophically, the model tends to over-balance in favor of the collective; it leaves a great deal of room, perhaps too much room, for governmental control that could result in de facto prior restraints. Practically, the model fails to provide the special circumstances apparently necessary for the courts to justify government intervention in the First Amendment rights of the individual. To the extent that states regulate cable companies as public utilities, then, they may to do so in direct violation of the First Amendment, especially when such regulation entails the direct or indirect control of practices that effect programming or programming decisions.

The Full Protection Model

The argument to this point, then, suggests that the most appropriate model of First Amendment rights for cable television

under existing law is the Print model. Under this model, however, nearly all the federal, state and local controls current imposed upon cable television are unconstitutional violations of the First Amendment. Unfortunately, while acceptance of the Print model and rejection of general state control appears the logical answer it does not satisfy the philosophical aims outlined earlier.

The Failed Market Theory Reconsidered

It is useful to reconsidered the failed market theory here because it lies at the heart of the problem itself, that problem being the potential domination of a system of communications by one company, individual or government. It is the threat of monopoly or oligopoly positioning in cable communications that leads to the difficult consideration of the often opposing interests of individual and collective. It is, after all, market forces that tend to constrict the libertarian ideal and frustrate the operation of a system of freedom of expression that would benefit both. Were freedom of entry into the market a reality, there would be little chance of a confrontation of the individual and social rights, for the variety of ideas and views necessary for a healthy polity would find no strong barriers to distribution.

It is just this concern, of course, that has led Congress to require equal access to broadcast facilities for political candidates and the F.C.C. to attempt to impose community access requirements on cable. It is also the motivating force behind access proposals for newspapers, such as those advocated by

Barron and others. The stumbling block, as has been noted, is the Supreme Court's refusal to acknowledge this situation as a legitimate foundation for the construction of an affirmative interpretation of the First Amendment for newspapers. In Tornillo the Court candidly admitted the severity of the situation and even seemed sympathetic to access proponents, but it declined to give those concerns sufficient weight to overcome the traditionally powerful barriers to government intervention in newspaper publishing. It is this decision as much as any other which has frustrated advocates of an affirmative reading of the First Amendment and prevented rational adoption of several of the already reviewed models of cable First Amendment rights.

The suggestion advanced here, and the key to a Full Protection theory of cable rights, is that Tornillo has been interpreted too broadly, or, at the very least, could be re-interpreted to permit the fashioning of First Amendment theory based on a failed market perspective without disturbing the narrower Court ruling as it applied to the specific facts of the case. A different approach to Tornillo and to the general question of access to the various media systems could offer the means for a fair balancing of social and individual interests in cable TV.

The first step is a stricter delineation of the distinguishing characteristics of different media. Some theorists have called for a First Amendment framework that extends equal protection and responsibilities to all media, creating a unified field theory of First Amendment rights. The Court, however, has

shown no sign of accepting such proposals and maintains an apparent position of establishing different sets of rules for different media.[117] Each medium, then, must be judged separately as to its ability to serve the interests of the individual and the collective.

The various media systems can be divided for these purposes along several dimensions, including industry economics, message production and social impact.[118] But classically, media definitions have centered around the methods of message maintenance and distribution. How the message is transmitted and how it is kept viable during that transmission are the related parameters that have seemed most pertinent to the Court.[119] Accordingly, media break down in the general categories of speech, cinema, print, broadcasting and cable. Each has a"common sense" definition, but specification along the lines outlined above may help prevent ambiguity. Specifically, speech is limited in distribution to those within earshot of the speaker and in duration by the ability of the sound wave to maintain the message. Cinema is maintained by the mechanism of film and is distinguished from television movies by a distribution system that relies on public theaters. Print is a system of symbols (as distinguished from cinema) imposed on a relatively permanent vehicle such as paper and distributed physically by a messenger system of greater or lesser sophistication.[120] Broadcasting is chiefly characterized by the use of the electromagnetic spectrum for over-the-air distribution of programming. Cable varies from broadcasting, of course, in the use of physical cable, either coaxial or fiberoptical, to move the electronic impulses that

form the message. The media can, thereby, be distinguished technically and such differences may serve as the foundation for First Amendment distinctions.

The important second step in the process is a consideration of the differing market structures of these media. It is a follow up to a suggestion by the appeals court in C.C.C. v. Boulder that the degree of natural monopoly (among other things) may make certain kinds of regulations constitutionally permissible in one medium that would be forbidden in another.[121] The basis for variable balancing of individual and collective interests then becomes the degree to which a given medium is open to multiple voices. While the categories of media are nominal, the scale upon which judgments are based is continuous. The greater the accessibility to the medium for different viewpoints, the less the need for state intervention to encourage such diversity. Alternatively, the less the "openness" of the system, the greater the need for balancing in favor of the interests of the collective. In fact, up to the point of including cable, this analytic framework describes well the results, if not the rationale, of the Court's consideration of the often conflicting rights of whole versus part. Speech and print are at the far libertarian end of this spectrum, offering almost unlimited access to anyone who wishes to stand on a stump in a public park and yell, or print up 100 political tracts and mail them to friends (or enemies).

At the other recognized end is the natural scarcity of channels of broadcasting and the attendant First Amendment

obligation of the broadcaster. Somewhere in the middle is cinema with greater rights than the broadcaster but still apparently less than the street-corner orator.[122] Use of an economic rationale for this First Amendment framework would, it seems, yield similar results. Broadcasting would still seem to be the most difficult forum to enter and speech the easiest. In addition, the failed market approach would provide some continuity for decision making, providing an underlying rationale common to all media yet still distinguishing among them. Further, and most important for present purposes, it would logically and easily fold in any new media that might develop, including cable television. Judicial acceptance of cable television's strong and acknowledged status as a natural economic monopoly would put it at the far end of the closed market scale and provide firm ground for the invocation of social First Amendment interests and subsequent equitable balancing of the competing constitutional claims. It is the key to any First Amendment model of cable rights that seeks full protection for the legitimate First Amendment claims of society and its citizens.

Still, it has been argued that similar proposals have fallen under the weight of Tornillo, that such market considerations have been rejected by the court as evidenced in that ruling. A closer examination reveals this not to be the case, however. The schema outlined above rests on the distinction between various media forms, broadcasting, print, cable. The decision in Tornillo did not hinge on such a broad analysis. The argument presented to the Court there dealt specifically with newspapers. It moved from a position that concentration and

monopoly in the daily newspaper industry warranted a reappraisal of First Amendment doctrine. The focus of subsequent analysis of the decision has been on the newspaper industry and its market structure, a structure arguably analogous to that of the cable industry. But herein lies the heart of the problem, for the analogy is mistaken; it is inappropriate to draw a constitutional parallel between cable and newspapers. The appropriate analogy is between cable and print. With respect to Tornillo, it is important to keep in mind that newspapers are only a subclass of the medium of print, and if the focus of that case can be shifted to a consideration of the full range of print outlets, its generalizability to other media is significantly diminished.

At the same time, this analytic framework need not change the outcome of Tornillo with respect to newspapers. In fact, if the Court had followed strictly the criteria suggested above with respect to the openness of the market, it would have had to come to the same conclusion. Because the issue must be settled in terms of access to the medium, and because newspapers represent only a small portion of the available print media, there is little to justify access requirements. The collective has a nearly unlimited range of news and opinion in the print medium, if it desires to seek it. Conversely, the same may not be said of cable. Cable is a medium unto itself and unlike the print medium not readily open to general and easy access by the individual without government intervention. Unlike print, control of that medium is singularly invested in any given area, and a

Tornillo-like case here, if based upon the Full Protection model, would come out much differently.

There is little to suggest that the Supreme Court had this framework in mind when it ruled in Tornillo. Nonetheless, were it to accept such an approach the decision in that case would not have to be altered. Much of the language, in fact, could be used to support a broad failed market theory and help build a Full Protection model of First Amendment rights for cable. The two do not have to conflict.

The ability of the Full Protection model to satisfy competing claims is, therefore, clear. But perhaps just as important is its feasibility, its potential for being accepted by the courts as a viable solution to the cable dilemma. That potential was, in fact, demonstrated in a decision by the U.S. District Court of Rhode Island in late 1983.[123] In Berkshire Cablevision v. Burke the district court adopted the rationale behind the Full Protection model, citing inherent differences between cable and print, and finding that Rhode Island regulations requiring mandatory public access channels did not violate the First Amendment. In handing down the decision, the court directly challenged the logic and dicta of the Eighth Circuit in Midwest Video II where the appeals court found similar access rules to be an unconsitutional imposition on cablecasters.

In the Rhode Island case, Berkshire cable challenged state Public Utility Commission regulations requiring at least three access channels. The company claimed the rules violated its First Amendment protection and, paralleling Midwest Video II, the company also challenged the P.U.C.'s statutory authority to

promulgate the rules. Unike Midwest Video II, the district court rejected the second argument without lengthy comment, finding the rules well within the P.U.C.'s power.[124] Unlike Midwest, then, the court was able to determine the constitutional question directly.

The judge outlined the controversy over the appropriate model of First Amendment rights for cable, com- paring Red Lion and C.B.S. v. D.N.C. (the Broadcast model) with Tornillo (the Print model) and concluding with a summary of the decision in Midwest. Observing the Eighth Circuit's finding that cable essentially fell into the newspaper mold and ought to be afforded the same rights, Senior Judge Pettine, for the district court, politely demurred:

> With all due deference to the Eighth and District of Columbia Circuits, I respectfully disagree with their analysis of the constitutionality of the access requirements for cable television systems. Newspapers and cable television cannot be equated. More to the point, the two media are constitutionally distinguishable.[125]

The judge found that distinction in three areas. The first was the historic nexus between cable and government and the contrary relationship between print and government.[126] The second distinction was in cable's necessary use of public thoroughfares, which opened the way for municipal oversight.[127] In these, the court echoed the thinking of the appeals court in C.C.C. v. Boulder,[128] and offered rationales already rejected here. But most of the judge's justification came in cable's admitted natural monopoly, and his analysis there fell directly in line with that suggested by the Full Protection model.

Specifically, the judge suggested that Tornillo was not applicable because it did not address a problem of monopoly in a medium of communication. The court said:

> Clearly, then, one of the basic issues in the instant case is whether or not economic "scarcity" is a constitutionally sufficient rationale for the regulation of cable television. While it is true that the Supreme Court has rejected economic scarcity as a basis for the regulation of newspapers, the lack of any access requirement for newspapers simply does not prevent a member of the general public from expressing his opinions in that same medium, which in such a case is print, of course.[129]

A citizen might then pamphleteer without great expense, said the court, but could not reasonably express his ideas through cable without the $7 million to build a system. And the court expressed confidence that such a distinction would not be ignored were the issue to come before the Supreme Court.[130] Concluded the judge:

> For this court, at least, scarcity is scarcity -- its particular source, whether "physical" or "economic" does not matter if its effect is to remove from all but a small group an important means of expressing ideas.[131]

The Failed Market theory serves at the outset then as the underpinning, the special circumstances, required for the use of countervailing social First Amendment interests. It is the hub of the Full Protection model, which subsequently offers two important First Amendment benefits: first, a practical recognition of the restricted access to cable television as it is currently structured, and second, the philosophical recognition of a need to balance individual and social rights as a result of that restriction.

The problem remains, however, of the logistics of that balancing. The failed market theory has been used, at least in part, by other models, leading to numerous and varied controls on content, structure and behavior. Simply proposing that conflicting rights be balanced, therefore, is insufficient. The limits of that balancing must be specified. Those limits are, in fact, suggested by the legal rationale itself. The aim, after all, is to supply the collective with as wide a variety of information and opinion as is available in the marketplace. And it should be clearly understood the role of the state is no more than to facilitate the availability of such views, it does not extend to the creation of diversity itself. That is, the state, acting for the collective, does not create new and different opinion for the sake of variety. Its only obligation is to remove barriers to such access that might arise via market or other forces. At the same time, the state has an obligation in the assertion of social interests to tread no more heavily on individual rights than is absolutely necessary to secure its purpose.

The legitimate claim of the collective, then, is that the full variety of viewpoints have access to the system, and the state's role, as representative of the collective, is to insure such access in the manner least offensive to the First Amendment rights of the system operator. The Full Protection model provides a relatively narrow corridor for state action: it is limited to maintaining access to the system. The model is, in short, a special form of access requirement grounded in First Amendment

theory; it gives the people a constitutional right of access to cable while protecting the cable operator from most regulations by the state. This is distinguished from access requirements grounded in legislative or regulatory law with minimal regard for the interests of the cablecaster.

The mechanism by which access is insured is not as important as who retains control of the mechanism. Given the constitutional importance of the question and the necessity of balancing interests in a First Amendment context, the task of final oversight for application of the access standard must fall to the courts. It has traditionally been the job of the courts to consider and act as arbiters in such matters. Trust has been placed in the courts to perform these functions and they must do so in application of the Full Protection model with due regard for the sensitive rights of both sides.

Actual mechanisms for the control of access can be as simple as a court order on behalf of a citizen denied access to the cable system. No other government body need be involved since the claim is based on the First Amendment right of the collective to receive that opinion (coupled with the First Amendment right of the individual to speak; a factor that is not necessary for assertion of the right but helps reinforce it). On the other hand, local governmental bodies may wish to attempt to establish, perhaps in concert with the industry, standards and processes by which system resources are made available for expressive activities. The model does not prohibit such guidelines or statutes as long as they meet with the approval of the courts as proper methods for the balancing of competing interests. Access

requirements that impose too heavily on the cablecaster may, in the judgment of the court, be unconstitutional as violations of individual rights.

Alternatively, non-governmental spokesmen for the community may argue that the proposals are inadequate for the satisfaction of community needs. Again, the courts must strike the constitutional compromise, guided by the desire to see all sides, including that of the cable operator, afforded opportunity for expression.

In practice, therefore, the Full Protection model would not require a specified number of access channels, although such a requirement could be accommodated. Since access for individual expressions is the chief goal, such access could be provided through any number of systematic or non-systematic methods. The cable company might voluntarily provide convenient times on one or more channels in response to specific access requests, or the courts, in response to individual requests for access, might intercede and require a half an hour access at one time, an hour of access at another time. On the surface this might seem an inefficient approach, but where requests for access are low it would not overburden the courts, and alternatives that legislatively set aside never-used channels would be the true inefficiencies.

Further, in return for the provision of minimal access service, the cable company would be freed of virtually all other government controls. There would be, in the first instance, no possibility of municipal franchising; no licensing of

communications systems. If a competing cable system or systems wished to vie for the attention and dollars of a city or suburb, that would be their right, the same right assured magazine and book publishers, shoe shops and fish merchants. This is unlikely to be the case, of course, but where the service of a monopoly company is uniformly bad, the temptation would be great for a potential competitor to step in and attempt to provide a lucrative, superior service. Simply the threat of such intervention might be sufficient to spur improvement in the established system.

In any event, service and rates would be established by market mechanisms and not by the state or the city. The only possible state interference in rate setting might come through antitrust action. If a company could be shown to maintain market dominance through illegal anticompetitive practices, then antitrust action could be taken to restore the natural process of pricing and competition.

Other behavioral controls such as community ascertainment would be equally forbidden, although a cable company would be subject to all normal business controls and taxes associated with other industries, the only fiat being that such controls not be aimed at manipulating content.

Structural controls also would fall under the weight of the First Amendment. The size of the cable system and what neighborhoods it served would not be a decision for a city council. If a given area could not economically be wired, the company would be under no legal obligation to wire it. Individuals in that area would have to demonstrate the economic

feasibility of bringing in a system or system branch.

Neither could a city demand a specified number of channels be established. If a company felt it could prosper offering 40 instead of 120 channels it would have the right to do so, although in practice companies competing for a new area would probably offer all the channels technically possible at the time, and the company that stayed with 12 channels when state-of-the-art systems provided 200 would be asking for competition. Ownership of a system could not constitutionally be the subject of legislation, and if a company or individual desired to acquire multiple cable systems, a chain of systems, only the antitrust laws would stand as a barrier to unlimited development.

Finally, and most importantly, the municipality, the state and the federal government would be forbidden from interfering with the content of cable television. All the controls on expression already constitutionally acceptable -- libel, privacy, obscenity, etc. -- would obviously be applicable to cable programming. But beyond these well-defined areas, the material that was distributed over the cable wires would be subject only to the editorial judgment of the system operator and access users. Viewer acceptance of certain programming would play a large role in the cable menu, but no city official would be permitted to ban a program or class of programs on grounds of moral objectionability or political disagreement.

Moreover, authorities would be prohibited from requiring the carriage of programming, be it city council meetings or the local broadcast station. Must-carry rules, in short, would be seen as

violations of the cablecaster's rights. Again, it seems unlikely that cablecasters would black out major broadcast signals in the area, but to the extent that fringe signals or minor station signals were blacked out, those broadcasters could seek refuge in antitrust laws that forbid activities designed to drive them out of business. Given the monopoly market leverage of a cablecaster, such a case would seem to have some hope for success.

Generally, then, the Full Protection model seeks through access to provide an open forum for views and opinions from all social segments on the grounds of the social need for such interchange, but it seeks to do so without overly restricting the rights of the cable operator to program and conduct business at his or her discretion. Many of the existing federal, state and local controls are therefore not in keeping with the model.

Summary

This paper has identified the fundamental philosophical barrier to fashioning an appropriate model of cable rights, that of the equitable balancing of individual and collective First Amendment claims against the medium. An approach for such a balancing -- based on the important underlying dimension of the inherent social utility in expression -- has been advanced, and various models of cable rights have been tested against the resultant standard. Each of the commonly used or proposed models -- Print, Broadcast, Public Forum, Common Carrier and Public Utility -- has been found defective on either practical or philosophical grounds. That is, they either fail to balance individual and collective rights or they lack a legitimate rationale for the invocation of collective First Amendment

interests that is required before such balancing can take place. In the end, it is suggested that under current constitutional interpretation only the Print model of cable rights is logically acceptable and as such nearly every form of federal, state and local control over cable television violates the First Amendment rights of the cable operator. Since this conclusion does not satisfy the proposed aim of constitutional balancing, however, a reinterpretation of the pivotal Tornillo v. Miami Herald case is called for. Such a reinterpretation would leave intact the outcome of the case as it pertains to newspapers, but would eliminate the possibility of generalizing the case to cable. This would permit the adoption of equitable balancing on the legitimate basis of market monopoly in one specifically defined medium. The result would be a model of cable rights that serviced the valid claims of the collective while preventing unwarranted infringement of the rights of the cable operator.

The Full Protection model, thus, could help establish a means of realizing the long-sought promise of cable television's capacity to provide an electronic forum, both nationally and locally, for the expression of diverse and antagonistic views, and, perhaps, serve to resolve some of the current legal problems that stand in the way of such a promise.

Endnotes

1. Quincy Cable TV, Inc. v. F.C.C., 730 F.2d 1549 (D.C. Cir. 1985).

2. Preferred Communications, Inc. v. Los Angeles, 754 F.2d 1996 (9th Cir. 1985).

3. City of los Angeles v. Preferred Communications -- U.S. -- (1986).

4. Z. Chafee, Free Speech in the United States, 33 (Atheneum, N.Y.: Harvard University Press, 1941).

5. W. Rivers, W. Schramm and C. Christians, Responsibility in Mass Communications 3d. ed. (New York: Harper and Row, 1980).

6. W. Rehnquist, The First Amendment Freedom, Philosophy and the Law, 12 Gonzaga law Review 1 (1976).

7. Id. at 3.

8. Justice Brennan, Address at the dedication of the Samuel Newhouse Law Center, Rutgers University, Oct. 17, 1979, see, 32 Rutgers L. Rev. 173 (1979).

9. Id. at 176.

10. Id. at 177.

11. See, L. BeVier, Justice Powell and the First Amendment's Societal Function': A Preliminary Analysis, 68 Virginia Law Review 177 (1982).

12. 417 U.S. 843, 862 (1974) (Powell, J., dissenting).

13. See, J. Stewart, Or of the Press, 26 Hastings Law Journal 631 (1975).

14. See, Zurcher v. Stanford Daily, 436 U.S. 547 (1978)(Stewart, J. dissenting).

15. T. Emerson, The System of Freedom of Expression, (New York: Random House, 1970), L. Tribe, American Constitutional Law (Mineola, New York: Foundation Press, 1975).

16. Id. at 6-7.

17. Tribe, supra note 15, at 576-579.

18. See, V. Blasi, The Checking Value in First Amendment Theory, 1977 A.B. Found. Research J. 521.

19. See generally, Rivers, Schramm and Christians, supra note 5 at 30-50.

20. See, Whitney v. Calif., 274 U.S. 357, 375 (1927).

21. T. Scanlon, A Theory of Freedom of Expression, 1 Philosophy and Public Affairs 204 (1971).

22. C. E. Baker, Scope of the First Amendment Freedom of Speech, 25 U.C.L.A. L. Rev. 964 (1978).

23. Id. at 965-66.

24. Id. at 966.

25. R. Dworkin, Is the Press Losing the First Amendment?, New York Review of Books, at 49, Dec. 4, 1980.

26. Brennan supra note 8, at 4.

27. E. Dennis, The Press and the Public Interest: A Definitional Dilemma, 23 DePaul L. Rev. 937 (1974).

28. See, A. Altshuler, The Potential of Trickle-Down, The Public Interest, 47, Nov. 15, 1969.

29. 403 U.S. 15, 24 (1971).

30. A. Meiklejohn, Political Freedom: The Constitutional Powers of the People (New York: Harper and Bros., 1960), although in his later years Meiklejohn amended his position to extend First Amendment protection artistic, philosophical, educational and scientific speech as well. See, J. Kalven, Robert Bork and the Constitution, 264, The Nation, Oct. 1, 1983.

31. Id. at 26.

32. Id. at 28.

33. See, e.g., Tribe, supra note 15, at 577-78.

34. J. Barron, Freedom of the Press for Whom? (Bloomington, Indiana: Indiana University Press, 1973).

35. Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 390 (1969).

36. See, e.g., Emerson, supra note 15, at 627-75.

37. See disc. infra, p. 20.

38. 47 C.F.R. sec. 76.13(c) (1977) (rescinded).

39. See, e.g., Cable Television First Report and Order, 20 F.C.C. 2d at 219-223 (1969).

40. Id.

41. 47 C.F.R. sec. 76.311m (1982).

42. While the F.C.C. has declined to limit the number of systems an operator may own, such controls have been considered (see, 33 Fed. Reg. 28 (1968)).

43. 453 U.S. 367, 395 (1981).

44. "Nothing in (the Communications) act shall be understood or construed to give the Commission the power of censorship over radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. sec. 326.

45. See, e.g., re: WUHY-FM, 24 F.C.C. 2d 408 (1970); Yale Broadcasting v. F.C.C., 478 F.2d 594 (D.C. Cir. 1973); and F.C.C. v.Pacifica Foundation, 438 U.S. 726 (1978).

46. See, U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968).

47. See e.g., H.B.O. v. F.C.C., 567 F.2d at 45; Midwest Video Corp. v. F.C.C., 571 F.2d at 1048; and Preferred, no. 84-5541, slip op. 13 (9th Cir. 1985).

48. See. e.g., G. Shapiro, P. Kurland and J. Mercurio, CableSpeech: The Case for First Amendment Protection, 8-13 (New York: Harcourt Brace Jovanovich, 1983).

49. See e.g., B.M. Owen and P.R. Grennhalgh, Competitive Policy Considerations in Cable Television Franchising, reprinted in Options for Cable Legislation, Hearings Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st. Sess (1983) serial no. 98-73. See also, G.K. Webb, The Economics of Cable Television (Lexington, Mass.: Lexington Books, 1983).

50. 418 U.S. 241 (1974).

51. See, e.g., Midwest Video Corp. v. F.C.C., 440 U.S. 689 (1979).

52. E.g., Preferred, supra note 47; Greater Freemont v. City of Freemont, 302 F.Supp. 652, 657 (N.D. Ohio 1968), and C.C.C. v. Boulder, 485 F.Supp 1035 (D. Colo. 1980).

53. See e.g., R. Hochberg, The States Regulate Cable, 28 (Cambridge, Mass.: Harvard University, 1978).

54. See, e.g., F.C.C. Staff Report on Cable TV Cross Ownership Policies, 97 n.28 (Nov. 27, 1981), or Dawson, How Safe is Cable's Natural Monopoly? Cablevision, June 1, 1981, at 333.

55. See. e.g. C.C.C.v. Boulder, 630 F.2d 704 (1980).

56. 7 Med. L. Rptr. at 1998.

57. See Lovell v. Griffin, 303 U.S. 444 (1938) and Cantwell v. Connecticut, 310 U.S. 296 (1949).

58. 310 U.S. at 308.

59. Preferred, supra note 47 at 15-18.

60. 440 U.S. at 708.

61. 47 U.S.C. secs. 153(a)(b) (1962).

62. Supra note 47 at 45 n.80. (HBO)

63. Supra note 47 at 1055-56.

64. Home Box Offie v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982); Community Television of Utah v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); and Cruz v. Ferre, 9 Med.L.Rptr. 2050 (S.D. Fla. 1983).

65. Preferred, supra note 47 n.11.

66. See, e.g., Berkshire Cablevision v. Burke, infra notes and disc., pp. 45-48, and Community Communications Co., Inc. v. City of Boulder, 7 Med.L.Rptr. 1993 (10th Cir. 1980), rev'd 102 S.Ct. 835 (1982).

67. See, e.g., Broadcasting, March 1, 1980, p. 104.

68. B. Ross, The First Amendment: A New Interpretation Needed for Cable, Cablevision, May 18, 1981, p. 156.

69. Supra notes 62, 63, 64 and 65.

70. J. Barron, Freedom of the Press for Whom?, supra note 34 at 4-5.

71. See, generally, K. McLane, Access to State Owned Communications Media - The Public Forum Doctrine, 26 U.C.L.A. L. Rev. 1410 (1979).

72. See, Hague v. C.I.O., 307 U.S. 496 (1939), and, generally, Kalven, The Concept of the Public Forum: Cox v. Louissiana, 1965 Sup. Ct. Rev. 1 (1965), and Horning, The First Amendment Right to a Public Forum, 1969 Duke L. J. 931 (1969).

73. See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972)(restricting public areas immediately adjacent to public schools); Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974)(restricting streets in residential areas); and Concerned Jewish Youths v. McGuire, 621 F.2d 471 (2d Cir. 1980)(suggesting special circumstances such as a history of violent activity may be sufficient to justify restrictions).

74. Fernando v. Limmer, 663 F.2d 619 (5th Cir. 1981).

75. International Society for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979).

76. Knights of Ku Klux Klan v. East Baton Rouge Parish School Board, 578 F.2d 1122 (5th Cir. 1978), on remand, 643 F.2d 1034 (5th Cir. 1981).

77. Dallas Ass'n of Community Organizations for Reform Now v. Dallas County Hospital District, 670 F.2d 629 (5th Cir. 1982).

78. Jeanette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp 575, aff'd, 409 U.S. 972 (1972).

79. Grace v. Burger, 665 F.2d 1193 (D.C. Cir. 1981), aff'd 103 S.Ct. 1702 (1983).

80. Marsh v. Alabama, 326 U.S. 501 (1946).

81. Supra note 72; also, Food Employees v. Logan Valley Plaza, 391 U.S. 308, 315 (1963).

82. Grayned v. City of Rockford, 408 U.S. 104 (1972).

83. McLane, supra note 71, argues that a "traditional analysis" and a "compatibility analysis" constitute separate tests for a finding of a public forum, and where traditional tests fail, a compatibility test might succeed solely on the basis of the close relationship between the requested access and normal access activities of the forum. But a close reading of his argument and support cases reveals something closer to a two-step analysis that requires an initial finding of traditional use and proceeds to consider compatibility only after establishing traditional associations.

84. Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975).

85. Hudgens v. N.L.R.B., 424 U.S. 507 (1976).

86. Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976).

87. Muir v. Alabama Educational Television Commission, 8 Med. L. Rpt. 2305 (5th Cir. 1982).

88. C.B.S. v. D.N.C., 412 U.S. 94, 116-121.

89. Cable Communications Policy act, sec. 621(c).

90. Infra, note 92.

91. One of the early concerns in CATV regulation was the potential status of cable under Title II of the Communications Act, giving the Commission regulatory power over common carriers, 47 U.S.C. tit. II (1947).

92. See e.g., I. de Sola Pool, Technologies of Freedom, 188 (Cambridge, Mass: Belknap Press, 1983); B. Owen, Communications for Tomorrow: Policy Perspectives for the 1980s, 240-42, ed. Glen Robinson (New York, Praeger Publishers, 1978) (advocating a common carrier scheme as the least intrusive means of controlling the new technology); The Sloan Commission: On The Cable, 46-48 (New York: McGraw Hill, 1971)(suggesting that eventual consideration of cable as a common carrier might be desirable); W. Jones, Regulation of Television by the State of New York, Report to the State of New York Public Service Commission, 199 (1970).

93. See e.g., S. 2172, 97th Cong. 1st Sess. (1982).

94. E.g., Connecticut, GSC, ch. 227, sec. 16; Delaware, Del. Code Ann., title 26; Alaska, Alaska Stat. sec. 42.05.701(8); Nevada, Nev. Rev. Stat. sec. 711.020.

95. E.g., New Jersey, N.J. Stat. Ann., 48:5A; Vermont, Vt. Stat. Ann., tit. 30, sec. 501; and Hawaii, Hawaii Rev. Stat. sec. 440-G.

96. E.g., Pennsylvania, H.B. 835 (1955); West Virginia, H.B. 397 (1955); Arizona, H.C.R. 12 (1957); Montana, S.B. 184 (1957) Washington, S.B. 425 (1957); Oregon, H.B. 1564 (1961); and Arkansas, H.B. 309 (1963).

97. Commission Chairman E. William Henry told the House Interstate Commerce Commission meeting that year on proposed cable regulation legislation that while cable could not be considered a common carrier it did have many attributes of a public utility; the states, therefore, should retain authority over such matters as rate regulation, extension of service and choice of entry. Regulation of Community Antenna Television: Hearings on H.R. 12914, H.R. 13286, and H.R. 14201 Before the House Comm. on Interstate Commerce, 89th Cong., 1st Sess. 49-51 (1966).

98. The National Cable Television Association submitted a detailed rebuttal entitled "A CATV System is Not of a Public Utility Nature" in which it argued against the public utility and common carrier rationales for state, local and federal regulation of service and rates. Id. at 489-520.

99. "Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. We have recognized that the speech of a heavily regulated business may enjoy constitutional protection. Consolidated Edison's position as a regulated monopoly does not decrease the information value of its opinions on critical public matters." 447 U.S. 530, 547 n.1 (1980).

100. Much is made in the decision of the difference between broadcasting and its permissible level of regulation and the medium at hand, the postal service. The Court noted that scarcity, which might justify such regulation, does not exist in this case and that the presence of the bill inserts in question would not preclude other inserts which the Commission (PSC) might lawfully order. Id. at 543.

101. See, generally, 73 C.J.S. secs. 1, 2.: "While the term has not been exactly defined, and . . . it would be difficult to construct a definition that would fit every conceivable case, the distinguishing characteristic of a public utility is the devotion of private property by the owner or person in control thereof to such a use that the public generally, or that part of the public which has been served and has accepted the service, has a right to demand that the use of the service, as long as it is continued, shall be conducted with reasonable efficiency and under proper charges."

102. See, A. Kahn, The Economics of Regulation: Principles and Institutions, vol. 1 (New York: John Wiley & Sons, Inc.,1970),p.12.

103. 73 C.J.S. sec. 2.

104. In the early years of cable, the attorneys general of both Arizona (12 R.R. 2094 (1955)) and New Mexico (10R.R. 2058 (1954)) determined that cable was not a public utility. The public utility commission of Utah ruled the same in 1958 (14 R.R. 2063).

105. Regulation of Community Antenna Television: Hearings on H.R. 12914, H.R. 13286, and H.R. 14201 Before the House Comm. on Interstate Commerce, 89th Cong. 1st Sess. 50 (1966).

106. White v. City of Ann Arbor, 281 N.W.2d 283 (1979); White v. Detroit Edison, 263 N.W.2d 367 (1978); Crowley v. New York Telephone Co., 363 N.Y.S.2d 292 (1975); Staminski v. Romeo, 310 N.Y.S.2d 169 (1970); Aberdeen Cable TV Service v. Aberdeen, 176 N.W.2d 738 (1970); Re. Cokeville Radio and Electric Co., 6 P.U.R.3d 129 (1954); Independent Theater Owners of Arkansas v. Arkansas PSC, 361 S.W.2d 642 (1962), (although at least one court has upheld PSC jurisdiction without a finding that cable was a public utility, Re. Cable TV, 332 A.2d 209 (1974)(New Jersey).

107. Staminski, 310 N.Y.S.2d 169, and Hoffman v. Capitol Cablevision Systems, Inc., 372 N.Y.S.2d 482 (1975).

108. TV Pix Inc. v. Taylor, 304 F. Supp. 459, 463 (D. Nev. 1968).

109. Id. at 467.

110. 281 N.W.2d at 290.

111. Noted N.C.T.A. officials during 1966 Congressional hearings: "CATV systems make available to their subscribers either a greater choice of television signals than they would have without CATV service or improved quality of of the pictures viewed on their television sets. In a sense this is a luxury service and luxury services have not been made subject to public utility regulation in the past." Regulation of Community Antenna Television, supra note 97, at 499.

112. Greater Freemont v. City of Freemont, 302 F. Supp. 652, 665 (N.D. Ohio 1968).

113. 611 P.2d 741, 745 (1980).

114. I. de Sola Pool, supra note 92 at 240.

115. In City of Owensboro v. Top Vision Cable Co. of Kentucky the court ruled cable television was, in fact, a public utility and as such the local franchise ordinance was a legitimate exercise of power based on the city's right to control streets, alleys and public grounds. 487 S.W.2d 283 (1972).

116. Community Antenna Television of Wichita, Inc. v. City of Wichita, 471 P.2d 360 (1970).

117. Joseph Burstyn v. Wilson, 343 U.S. 495, 503 (1952); Kovacs v. Cooper, 336 U.S. 77 (1949); Red Lion v. F.C.C., 395 U.S. 367, 386 (1969).

118. See e.g., F.C.C. v. Pacifica, 98 S.Ct. 3026 (1978).

119. See e.g., Red Lion.

120. This can range from the corner pamphleteer to the U.S. Postal Service, but includes commercial merchandising and newspaper carriers.

121. 7 Med.L.Rptr. 1993, 2000 (1981).

122. See, e.g., Star v. Preller, 419 U.S. 956 (1974)(upholding film licensing procedures that met with standards of due process).

123. Berkshire Cablevision v. Burke, 9 Med. L. Rptr. 2321 (1983).

124. Id. at 2326 n.7.

125. Id. at 2329.

126. Id. at 2327.

127. Id. at 2326.

128. 7 Med.L.Rptr. at 1993-2000.

129. Burke, supra note 124 at 2328.

130. Id.

131. Id. at 2329.